i

Supreme Court, U.S.
FILED
04 547 OCT 18 2004
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Paul Trunnell
PETITIONER,
v.
Summit County, RESPONDENT.

On Petition for a Writ of Certiorari to the Utah State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

B. Ray Zoll
Counsel of Record
Zoll & Tycksen, L.C.
5300 South 360 West
Suite 360
Murray, UT 84123
(801) 685-7800

In May of 2001, Utah's Summit County sold Petitioner's real and private property at a tax sale, pursuant to vague and ambiguous statutory guidelines. Summit County violated Petitioner's Constitutional rights by (1) unilaterally changing the previously announced sale date, (2) by failing to provide Petitioner adequate notice of the new—earlier—sale date, (3) conducting the sale while knowing that second parties of interest (mortgagee, *inter alia*) did not receive actual notice, and (4) breaching an agreement made by the Summit County Auditor to allow Petitioner additional time to redeem his property.

Question presented:

By failing to abide by the legal promise that taking property must be by strictissimi juris, by failing to comply with statutory requirements to provide proper notice, and by refusing to honor a promise made by a county officer with apparent authority to make that promise, are Summit County's acts in selling Petitioner's property at a tax sale for pennies on the dollar repugnant to the rights of due process and equal protection under the laws as provided in the fourteenth amendment to the United States Constitution, as it applies to every property owner across the country?

QUESTION PRESENTED: I

TABLE OF AUTHORITIES III

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 1

UNITED STATES CONSTITUTION AMENDMENT XIV: 1

UTAH CODE§ 59-2-1351 1

STATEMENT OF THE CASE 3

SUMMIT COUNTY CHANGED THE DATE OF THE TAX SALE EFFECTIVELY DENYING PETITIONER HIS RIGHT TO REDEEM THE PROPERTY PRIOR TO ITS SALE. 5

THERE IS NO RECORD OF ACTUAL NOTICE TO PETITIONER OF THE MAY 24, 2001 SALE 5

THE RECORDS SHOW THAT OTHER PARTIES OF INTEREST DID NOT RECEIVE NOTICE AND THE COUNTY EXERCISED NO DILIGENCE IN GIVING THESE PARTIES NOTICE 7

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962) 7
Dent v. West Virginia, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889) 8
Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 796, n.3., 103 S.Ct. 2706 (1983) 8, 9
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652 (1950). 6
Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974) 8

State Cases

94 P.3d 929 1

Federal Statutes

28 U.S.C. § 1257(a) 1

State Statutes

Utah Code § 59-2-1351 2
Utah Code 59-2-1343 to 59-2-1351 3

Other Authorities

United States Constitution Amendment XIV 1

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The July 19, 2004 denial of certiorari by the Utah Supreme Court is reported at 94 P.3d 929 (**App., 1a-2a**). The opinion of the Utah Court of Appeals (**App., 3a-13a**) is unreported. The Order on Motions for Summary Judgment and Judgment of the Utah Third District Court (**App., 13a-19a**) is unreported.

JURISDICTION

Utah Court of Appeals entered judgment on March 4, 2004. Petitioner filed a timely petition for a writ of certiorari in the Utah Supreme Court, which that Court denied on July 19, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV:
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code§ 59-2-1351.
Sales by county -- Notice of tax sale -- Entries on record.
(1) (a) Upon receiving the tax sale listing from the county treasurer, the county auditor shall select a date for the tax sale

for all real property on which a delinquency exists that was not previously redeemed and upon which the period of redemption is expiring in the nearest tax sale.

(b) The tax sale shall be conducted in May or June of the current year.

(2) Notice of the tax sale shall be provided as follows:

(a) sent by certified and first class mail to the last-known recorded owner, the occupant of any improved property, and all other interests of record, as of the preceding March 15, at their last-known address; and

(b) published four times in a newspaper published and having general circulation in the county, once in each of four successive weeks immediately preceding the date of sale; or

(c) if no newspaper is published in the county, posted in five public places in the county, as determined by the auditor, at least 25 but no more than 30 days prior to the date of sale.

(3) The notice shall be in substantially the following form:

NOTICE OF TAX SALE

Notice is hereby given that on _____(month\day\year), at __ o'clock __. m., at the front door of the county courthouse in ____ County, Utah, I will offer for sale at public auction and sell to the highest bidder for cash, under the provisions of Section 59-2-1351.1, the following described real property located in the county and now delinquent and subject to tax sale. A bid for less than the total amount of taxes, interest, penalty, and administrative costs which are a charge upon the real estate will not be accepted.

(Here describe the real estate)

IN WITNESS WHEREOF I have hereunto set my hand and official seal on _____(month\day\year).

_____

County Auditor

_____

County

(4) (a) The notice sent by certified mail in accordance with Subsection (2)(a) shall include:

(i) the name and last-known address of the last-known recorded owner of the property to be sold;

(ii) the parcel, serial, or account number of the delinquent property; and

(iii) the legal description of the delinquent property.

(b) The notice published in a newspaper in accordance with Subsection (2)(b) shall include:

(i) the name and last-known address of the last-known recorded owner of each parcel of property to be sold; and

(ii) the street address or the parcel, serial, or account number of the delinquent parcels.

STATEMENT OF THE CASE

Petitioner brought suit in the Utah Third Judicial District against Summit County alleging, *inter alia*, the violation of constitutional right to due process (Utah Court of Appeals, Appellant's Opening Brief, 22). The court granted Respondent's motion for summary judgment. Petitioner timely appealed to the Utah Court of Appeals, again arguing due process violations. The Utah Court of Appeals affirmed the district court. Petitioner timely filed a petition for a writ of cert to the Utah Supreme Court, again alleging violation of

Petitioner's right to due process. The Utah Supreme Court denied the petition.

Petitioner, having received notice that this property would be sold at a tax sale on May 31, 2001, was preparing to redeem his property prior to the May 31, 2001 date of the tax sale. Summit County unilaterally changed the date of the sale to May 24, 2001.

Material facts surrounding this sale are:

1. January 23, 2001 Summit County sent notice to Petitioner regarding delinquent taxes and notifying Petitioner that the sale would be held on May 31, 2001 at the Summit County Courthouse (Utah Court of Appeals, Appellant's Addendum Exhibit H).
2. In April, 2001 Summit County Auditor, Blake Frazier changed the date of the sale to May 24, 2001 so that some county employees could attend a conference (Utah Court of Appeals, Appellant's Opening Brief, 11).
3. On April 30, 2004 Summit County sent another notice of tax sale, showing the new date but otherwise not calling attention to the change of dates. This notice was not mailed to Petitioner at his last address of record as required by Utah Code § 59-2-1351 and was returned by the Postal Service marked "return to sender."
4. On May 15, 2001 Petitioner called and spoke to Summit County Auditor, Blake Frazier. Upon asking if there was a way to defer the tax sale so that Petitioner could raise the money to redeem the property. Auditor Frazier said that Petitioner could pay $2,000 by mail and the remainder within 30 days. (June 14, 2001). Auditor Frazier did not set a deadline for the initial payment.
5. On May 15, 2001, Petitioner mailed a $2,000 check, unfortunately without sufficient postage on the envelope (Petitioner repeated this accident on at least

one other bill mailed the same day (Utah Court of Appeals, Appellant's Addendum Exhibit K)).

6. On May 24, 2001, and without further notice to Petitioner, his property was sold by the County for $31,000.

Summit County changed the date of the tax sale effectively denying Petitioner his right to redeem the property prior to its sale.

When Summit County sent Petitioner the January notice stating that the sale would be held on May 31, 2001 at the Summit County courthouse, it met the notice requirements of Due Process. When it later changed the date of the tax sale, it also took on a due process burden to give notice to all interested parties of the *changed date.*

In failing to use due diligence to satisfy the County's responsibility to provide notice of the change, it violated Petitioner's right to due process and equal protection of the laws.

There is no record of actual notice to Petitioner of the May 24, 2001 sale

On January 23, 2001, the Summit County Treasurer sent a Delinquent Tax Billing statement to Petitioner notifying him of a tax delinquency in the total amount of six thousand sixty-five dollars and forty-nine cents ($6,065.49). Contained within the Delinquent Tax Billing statement was the following statement:

> In accordance with Utah Code 59-2-1343 to 59-2-1351, after March 15, 2001 your property will be sold at public auction for non-payment of taxes. This sale will be held at the Summit County Courthouse on May 31, 2001.

(Utah Court of Appeals, Appellant's Addendum Exhibit H). It is undisputed that this notice was mailed to Petitioner, and that he received it. The notice is specific as to date and place

of sale leading a reasonable person to believe that the sale would be held on that day and at that place.

Sometime in April 2001, Summit County decided to hold the sale on May 24, 2001, a week *before* the date shown on the previous notice. Summit County claims that it mailed a newer notice, with the expedited date, to Petitioner on April 30, 2001. Evidence shows that a notice was sent first to an old address (not the address of record, as required by statute) and returned as undeliverable. Notice was later sent to Petitioner's then-current address by certified mail, but the undated return receipt does not show that Petitioner received the notice,[1] nor *whether it was delivered before the actual sale date.*

Since Summit County cannot prove personal service the question turns to the duty owed to Petitioner by Summit County regarding due process. This Court has said:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652 (1950).

Can Summit County's actions be said to be reasonably calculated, under all the circumstances, to apprise Petitioner and other interested parties notice of the pendency of the sale? They cannot, and thus are violations of Petitioner's right to due process.

---

[1] It was signed for by Petitioner's wife out of state and allegedly not opened (App. Utah Court of Appeals, Appellant's Addendum Exhibit I).

The records show that other parties of interest did not receive notice and the County exercised no diligence in giving these parties notice

In addition to their failure to effect personal service on Petitioner, Summit County failed to provide actual notice to other parties of interest to the property, who would have redeemed it, and also failed to exercise any diligence in trying to provide the statutorily-required notice.

Summit County's lone attempt to give notice to the private mortgagee was a letter sent to an old post office box and returned to Summit County (Utah Court of Appeals, Appellant's Addendum Exhibit I). Another party of interest, Old Republic Title Company, was likewise mailed a notice and it was likewise returned to Summit County. Old Republic Title Company is a large Utah title company and even the most desultory inquiry would have turned up their address in Provo, Utah.

Finally, and perhaps most egregiously, Petitioner called the Summit County Assessor and made an arrangement to redeem the property by mailing $2,000 and paying the balance within thirty days. Petitioner wrote the $2,000 check and mailed it, but with inadequate postage. Unaware of the postage problem, Petitioner called the Summit County Assessor on May 21, 2001 to see if the Auditor had received Petitioner's check. Petitioner left a voice message questioning the receipt of the check and said he was arranging financing to redeem the property in full before the 30-day deadline.[2] The Summit County Assessor

---

[2] Summit County Auditor, Blake Frazier, admits both the calls and the agreement, but disputably states that the arrival of the checks was a condition precedent. The County then argued that Frazier, who regularly used this informal, non-mandated policy, was without authority to do so. Since this case was decided on summary judgment, Petitioner states the facts in a light most consistent with his opposition. "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party

d not return Petitioner's call or make any effort to inform m that his property was being sold in three days.

The district court and the Utah Court of Appeals und that putting the check in the mail with a one cent stamp d not constitute mailing, and, therefore, Petitioner did not erform. The courts below did not address such issues as der or time of performance, nor whether it was reasonable r Petitioner to believe that he had a bargain that had taken s property off the tax sale list for thirty days, nor the onstitutional issues raised.

This Court has frequently held that notice is dispensable to due process: "Our cases have required the ate to make efforts to provide actual notice to all interested rties comparable to the efforts that were previously quired only in in personam actions." *Mennonite Bd. of issions v. Adams*, 462 U.S. 791, 796, n.3., 103 S.Ct. 2706 983), yet Summit County failed on several fronts in its ckadaisical efforts to provide notice to parties on interest in is case.

EASONS FOR GRANTING THE PETITION

. "The touchstone of due process is protection of the individual against arbitrary action of government[.]" *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974) quoting *Dent v. West Virginia*, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889) Here, a County official arbitrarily changed the date of the tax sale, and in doing so abrogated previous notices of the pending sale, which Petitioner was relying on. The County then failed to provide adequate notice to the parties of interest, as they are required to do by statute. The County says that all that is required is to *mail* notice, it is not required to use any diligence to see that notice is *actually received*. This

---

posing the motion." *U.S. v. Diebold, Inc.* 369 U.S. 654, 655, 82 S.Ct. 3, 994 (1962) *per curiam.*

position is contrary to previous Supreme Court rulings. "Our cases have required the State to make efforts to provide actual notice to all interested parties comparable to the efforts that were previously required only in in personam actions." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796, n.3., 103 S.Ct. 2706 (1983). The standards of how much effort to provide actual notice the government must take are still vague and consideration of this case would be of assistance to courts at all levels of government.

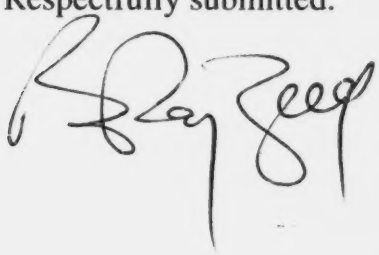
2. The forfeiture of a citizen's real property is among the harshest measures a state can take against a citizen. This is why the government has seen fit to grant the citizen constitutional protection: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Amendment XIV United States Constitution). These rights are best protected by this Court, which can fix guidelines in the interest of uniformity of states actions. The Court's guidance can further the interests of justice by again addressing the acts necessary to protect the rights of its citizens.

CONCLUSION

Summit County, with no apparent concern for the rights of the Petitioner, and without regard for due process or equal protection, sold the Petitioner's property, valued at $2,000,000, for a mere $31,000.

The petition for a writ of certiorari should be granted.

Respectfully submitted.



IN THE SUPREME COURT OF THE STATE OF UTAH

NOTICE OF DECISION

Paul Trunnell, an individual,

Appellant and Petitioner,

v. 20040353-SC
20020876-CA
010500222

Summit County; Jim Sorensen, an individual;
and Connie Sorensen, an individual,

Appellees and Respondents.

The above-entitled case was submitted to the court for decision and the attached order has been issued.

Order issued: July 19, 2004
Notice of Decision issued: July 21, 2004
Record: None
THIRD DISTRICT, SILVER SUMMIT, # 010500222

S/Pat H. Bartholomew
Clerk of Court

By s/Vera Dolan
Deputy Clerk

7-21-04
Date

IN THE SUPREME COURT OF THE STATE OF UTAH

NOTICE OF DECISION

Paul Trunnell, an individual,

Appellant and Petitioner,

No. 20040353-SC
20020876-CA

v.

Summit County; Jim Sorensen, an individual;
and Connie Sorensen, an individual,

Appellees and Respondents.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on May 5, 2004.

IT IS HEREBY ORDERED pursuant to Rule 45 of the Utah Rules of Appellate Procedure the Petition for Writ of Certiorari is denied.

For the Court:

Dated July 19, 2004

s/ Christine M. Durham
Chief Justice

IN THE UTAH COURT OF APPEALS
----ooOoo----

Paul Trunnell,

Plaintiff and Appellant,

v.

Summit County, James Sorensen, and Connie Sorensen,

Defendants and Appellees.

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 20020876-CA

FILED
(March 4, 2004)

2004 UT App 45

Third District, Silver Summit Department

The Honorable Robert K. Hilder

Attorneys: B. Ray Zoll and S. Dayn Kelson, Murray, for Appellant

David L. Thomas and Jami R. Brackin, Coalville, and Victoria C. Fitlow, Park City, for Appellees

---

Before Judges Bench, Davis, and Jackson.

DAVIS, Judge:

Paul Trunnell appeals a trial court order granting Defendants' motions for summary judgment[1] and denying Trunnell's cross-motion for summary judgment. We affirm.

I. Summit County's Motion For Summary Judgment

Trunnell argues that the trial court erred by granting summary judgment in favor of Summit County. Specifically, Trunnell asserts that the trial court erred (A) by ruling that Summit County complied with all of the statutory provisions concerning property tax sales; (B) in its rulings concerning Trunnell's alleged oral agreement with the Summit County Auditor (Auditor); and (C) by determining that a certain five-acre parcel was not a separate parcel.

A. Statutory Compliance

Trunnell argues that Summit County failed in several respects to comply with all of the statutory provisions concerning property tax sales and, therefore, that the trial court erred by ruling that Summit County complied with such provisions.[2] "Tax sales are made exclusively under statutory power, and, unless all the necessary prerequisites of the statute are carried out, the tax sale becomes invalid. If one of the prerequisites fail, it is as fatal as if all failed." Olsen v. Bagley, 10 Utah 492, 37 P. 739, 740 (1894). "When the deed is executed and delivered by the auditor, it shall be prima

facie evidence of the regularity of all proceedings subsequent to the date the taxes initially became delinquent and of the conveyance of the property to the grantee in fee simple." Utah Code Ann. § 59-2-1351.1(9)(b) (2000).

First, Trunnell argues that the signed statements for 1996 did not comply with the applicable statutory provisions and, therefore, that the property tax sale was invalid. See Utah Code Ann. § 59-2-311, -326 (2000). Trunnell asserts that the Summit County Assessor failed to complete the signed statement for the 1996 assessment book by May 22, 1996, as required by statute, because it was completed on May 24, 1996.[3] See id. § 59-2-311. Trunnell also asserts that it is unclear whether the Auditor completed the signed statement for the 1996 assessment roll by November 1, 1996, as required by statute, because, although it was completed, it was not dated. See id. § 59-2-326. Trunnell does not dispute the subject matter, accuracy, or content of either of these signed statements.[4] Instead, he inappropriately relies upon Telonis v. Staley, 104 Utah 537, 144 P.2d 513, 516-19 (1943), to argue that these minor defects in the signed statements invalidate the property tax sale. Telonis does not support this argument; rather, Telonis stands for the proposition that the absence of an auditor's signed statement can invalidate a property tax sale. See Thomas v. Heirs of Braffet, 6 Utah 2d 57, 305 P.2d 507, 509-10 (1956) ("Later cases have never wavered from this [proposition announced in Telonis], and it is now a firmly established rule of law in this jurisdiction that the absence of the auditor's [signed statement] is a fatal defect and would render void a tax sale upon which a tax deed is based." (emphasis added)), overruled on other grounds by First Equity Fed., Inc. v. Philips Dev., LC, 2002 UT 56, 52 P.3d 1137. Therefore, Trunnell's argument fails.

Second, Trunnell argues that Summit County failed to provide adequate notice of the property tax sale, as required by statute. See Utah Code Ann. § 59-2-1351(2)(a)-(c) (2000).[5] This argument is unsupported by the record, which reveals that Summit County complied in all respects with the statutory notice requirements. The plain language of section 59-2-1351(2)(a) required that Summit County's notice of the property tax sale be "sent by certified and first class mail to the last-known recorded owner, the occupant of any improved property, and all other interests of record, as of the preceding March 15, at their last-known address." Id. § 59-2-1351(2)(a). The record shows that Summit County "sent" notices to each of the appropriate parties, including Trunnell, "by certified and first class mail" to "their last-known address."[6] Id. The plain language of section 59-2-1351(2)(b) required that Summit County's notice of the property tax sale be "published four times in a newspaper published and having general circulation in the county, once in each of four successive weeks immediately preceding the date of sale." Id. § 59-2-1351(2)(b). The record shows that Summit County published the notice of the property tax sale "four times" in The Park Record, a newspaper "having general circulation in" Summit County, "once in each of four successive weeks immediately preceding the date of sale."[7] Id.

Summit County complied with all of the statutory provisions concerning property tax sales and, therefore, we conclude that the trial court did not err by ruling that Summit County complied with such provisions.

B. Oral Agreement

Trunnell argues that the trial court erred in its rulings concerning Trunnell's alleged oral agreement with the Auditor. Although Trunnell challenges several of the trial court's alternative or collateral determinations about the

alleged oral agreement, he never adequately challenges its central determination about the agreement, which states: "[E]ven accepting as true [Trunnell]'s allegations of fact as to the content of [the oral] agreement, [Trunnell]'s placing a check in the mail with only a [one-cent] stamp does not constitute 'mailing' and, therefore, . . . [Trunnell] failed to perform his end of the bargain, thereby relieving [Summit] County of any duty to perform." We conclude that this determination is entirely correct and dispositive of all issues raised by Trunnell relating to the alleged oral agreement. Because Trunnell's mailing of a check with inadequate postage did not constitute performance on his part, even if his allegations about the content of the oral agreement are accepted as true, Summit County was under no duty to perform. See Coulter & Smith, Ltd. v. Russell, 966 P.2d 852, 860 (Utah 1998) (stating that if consideration fails because one party fails to perform under a contract, the other party cannot be compelled to perform). Even if we were to agree with Trunnell's arguments regarding the trial court's collateral or alternative determinations about the alleged oral agreement, that would not affect our conclusion that the trial court's ultimate determination about the agreement is correct.[8]

C. The Five-Acre Parcel

Trunnell argues that the trial court erred by determining that a certain five-acre parcel was not a separate parcel. This argument is without merit. As we have previously noted, the record shows that the sale of Trunnell's property was based solely upon property tax delinquency for 1996. The record also shows that for the 1996 tax year, the five-acre parcel had not yet been assigned a separate tax identification number and that all of Trunnell's property was taxed as one parcel. Accordingly, the trial court did not err by determining that

the five-acre parcel was not a separate parcel for purposes of the property tax sale.

Based upon the foregoing, we conclude that the trial court did not err by granting summary judgment in favor of Summit County.

II. Sorensens' Motion For Summary Judgment

Trunnell argues that the trial court erred by granting summary judgment in favor of the Sorensens. All of Trunnell's arguments on this issue are based upon the assumption that he somehow retained an interest in the property after the tax deed was issued to the Sorensens. Because we have concluded that the property tax sale was valid, Trunnell's interest in the property was extinguished upon the issuance of the tax deed. See Hanson v. Burris, 86 Utah 424, 46 P.2d 400, 406 (1935) (stating that purchasers at a tax sale "take with a 'new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and [e]ncumbrances of private persons, and all equities arising out of them'" (citations omitted)), aff'd, 297 U.S. 378, 56 S. Ct. 511 (1936); see also Utah Code Ann. § 59-2-1351.1(9)(a) (2000) (stating that tax deed conveys property to purchaser in "fee simple"). There is nothing in the record to suggest that, after issuance of the tax deed, the Sorensens' actions in relation to the property or Trunnell could be construed as anything but exercises of their rights as property owners. Therefore, Trunnell's arguments on this issue fail and we conclude that the trial court did not err by granting summary judgment in favor of the Sorensens.

We affirm the trial court's order granting Defendants' motions for summary judgment and denying Trunnell's cross-motion for summary judgment.

James Z. Davis, Judge

I CONCUR:

Norman H. Jackson, Judge

I CONCUR IN THE RESULT:

Russell W. Bench,

Associate Presiding Judge

1. The trial court granted summary judgment in favor of Defendants in response to two separate motions. Defendant Summit County filed its motion for summary judgment on claims 1-3 of Trunnell's complaint, and Defendants James and Connie Sorensen (Sorensens) filed their motion for summary judgment on claims 4-8 of Trunnell's complaint. Although the trial court granted both of these motions, it granted each upon different grounds. As such, Trunnell presents separate arguments for each motion on appeal.

2. Trunnell presents several arguments alleging failures by Summit County to comply with the statutory provisions governing property taxes in tax years other than 1996. However, because the sale of Trunnell's property was based

solely upon property tax delinquency for the 1996 tax year, we do not address his arguments based upon tax years other than 1996.

3. The penalty for an assessor's failure to complete an assessment book in a timely manner is governed by Utah Code Annotated section 59-2-314 (2000), which states:

Any assessor who fails to complete and deliver the assessment book to the county auditor within the time prescribed by law . . . shall pay a penalty of $1,000, to be recovered on the assessor's official bond, for the use of the county, or deducted from salary by the county legislative body.

Id. Private citizens do not have the legal right to bring an action to enforce this penalty. See Stromquist v. Cokayne, 646 P.2d 746, 748 (Utah 1982) (holding, under former section, that private party did not have legal right to bring an action to enforce penalty).

4. This position was confirmed by Trunnell's counsel at oral argument.

5. Utah Code Annotated section 59-2-1351(2) (2000) provides:
Notice of the tax sale shall be provided as follows:
(a) sent by certified and first class mail to the last-known recorded owner, the occupant of any improved property, and all other interests of record, as of the preceding March 15, at their last-known address; and
(b) published four times in a newspaper published and having general circulation in the county, once in each of four successive weeks immediately preceding the date of sale; or
(c) if no newspaper is published in the county, posted in five

public places in the county, as determined by the auditor, at least 25 but no more than 30 days prior to the date of sale.

Id. § 59-2-1351(2)(a)-(c).

6. Although Trunnell argues that the notices sent by Summit County are inadequate, he does not demonstrate how the notices are inadequate under the plain language of section 59-2-1351(2)(a). Instead, his argument attempts to add additional requirements to section 59-2-1351(2)(a) or impose additional duties for notice upon Summit County.

7. Trunnell argues that under Home Owners' Loan Corp. v. Stevens, 98 Utah 126, 97 P.2d 744, 745-47 (1940), the requirement of notice by publication "once in each of four successive weeks immediately preceding the date of sale," Utah Code Ann. § 59-2-1351(2)(b), requires notice by publication for twenty-eight days. See Stevens, 97 P.2d at 747 (construing predecessor to section 59-2-1351, which required published notice for four consecutive weeks, to require notice for total number of days in four consecutive weeks, or twenty-eight days). We are unpersuaded by Trunnell's argument.

The Stevens court was required to construe the predecessor to section 59-2-1351 because, although the statute clearly stated the number of publications required for notice by publication, it was ambiguous regarding the required notice period for notice by posting. See Stevens, 97 P.2d at 745-47. As a result of this ambiguity, the Stevens court concluded that the notice period for notice by publication also applied to notice by posting. See id. at 746-47. However, the court observed that because the notice period for notice by publication denoted the number of publications, "once a week for four consecutive weeks," id. at 745 (quotations and citation omitted), it could not be easily applied to notice by posting.

See id. at 746-47. As a result, the court concluded that, in order for the notice period to be applicable to both types of notice, it must be viewed as a reference to duration of notice both in case of publication and of posting, since the statute clearly does not contemplate that a notice be posted four times during the period. Doubtless the legislature might prescribe the number of newspaper publications which would suffice as a prerequisite to holding a sale and duration of time of notice if made by posting, but as used in the section under examination it indicated no such distinction.

Id. at 746.

The language of section 59-2-1351 is different from that of its predecessor, and the distinction described in Stevens is now present in section 59-2-1351. Section 59-2-1351 now clearly "prescribe[s] the number of newspaper publications which . . . suffice as a prerequisite to holding a sale and duration of time of notice if made by posting." Stevens, 97 P.2d at 746; see Utah Code Ann. § 59-2-1351(2)(b)-(c) (stating that notice be published "once in each of four successive weeks immediately preceding the date of sale" or posted "at least 25 but no more than 30 days prior to the date of sale"). As such, the ambiguity that existed in its predecessor no longer exists in section 59-2-1351. Therefore, we conclude that the holding of Stevens is inapplicable to section 59-2-1351.

Accordingly, in determining the required notice period for notice by publication, if any, we look to the plain language of section 59-2-1351(2)(b). See In re Estate of Flake, 2003 UT 17,¶25, 71 P.3d 589 (stating that in statutory construction, we look first to the plain language of a statute and go beyond the plain language only if an ambiguity exists). Section 59-2-1351(2)(b) does not contain a required notice period for notice by publication, but instead requires that the notice be

"published four times . . . , once in each of four successive weeks immediately preceding the date of sale." Utah Code Ann. § 59-2-1351(2)(b).

8. Trunnell also presents a promissory estoppel argument. One of the required elements for a promissory estoppel claim is that the "[promissee] acted with prudence and in reasonable reliance on a promise made by the [promisor]." J.R. Simplot Co. v. Sales King Int'l, Inc., 2000 UT 92,¶29, 17 P.3d 1100 (alterations in original) (emphasis added) (quotations and citations omitted). Although Trunnell may have reasonably relied upon the alleged promise by the Auditor, Trunnell clearly did not act with prudence by attaching only a one-cent stamp when mailing his check to the Auditor. Because this element is not satisfied, Trunnell's promissory estoppel argument fails.

IN THE THIRD DISTRICT COURT IN AND FOR SUMMIT COUNTY, STATE OF UTAH

Paul Trunnell an individual, Plaintiff vs. Summit County; James Sorensen, an individual; and Connie Sorensen, an individual, Defendants.	ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND JUDGMENT Case No. 010500222 Judge Robert K. Hilder

The following motions came for hearing before the Court on Thursday, August 15, 2002, at 9:00a.m., at the Silver Summit Courthouse in Summit County, Utah:

1. **Summit County's Motion for Summary Judgment;**
2. **Defendants James and Connie Sorensen's Motion for Summary Judgment on Claims 4 & 5;**
3. **Defendant James and Connie Sorensen's Motion for Summary Judgment on Claims 6, 7, & 8; and**
4. **Plaintiff's Cross-Motion for Partial Summary Judgment.**

Mr. B. Ray Zoll of Zoll & Tycksen was present representing Plaintiff Paul Trunnell. Ms. Jami Bracklin was present representing Defendant Summit County.

Mr. Joseph E. Wrona and Ms. Victoria C. Fitlow of Wrona, Fitlow, Kozak & Easterly, P.C. were present representing Defendants James and Connie Sorensen.

The Court, having considered the various motions, memoranda in support thereof, opposing memoranda, and reply memoranda, and having heard oral argument for all parties, and good cause appearing therefore, hereby makes and enters the following **ORDER**:

1. The Court finds that there are no disputed issues of material fact. While there appears to be a factual dispute as to the content of a telephone conversation between Plaintiff and Blake Frazier, the Summit County Auditor, the Court finds that any such dispute is not material to this case for reasons set forth below.
2. The Court finds that, as a matter of law, Summit County properly complied with all relevant aspects of the statute governing county tax sales. The Court so finds, giving consideration to the rights of Plaintiff as a property owner, and balancing those rights consistent with justice to others and the public interest in finality concerning property ownership. In so finding, the Court notes that it considered the fact that Summit County did not make any mistakes in connection with the tax sale, nor did the Sorensens, but that Plaintiff's mistakes were legion. Plaintiff's mistakes, weighed against the absence of mistakes by Summit County and the Sorensens, and the public interest in the certainty of tax sales leads this Court to the above conclusion.

3. The Court finds that, as a matter of law, Summit County provided proper statutory notice to Plaintiff, by both mail and publication, of the Summit County Tax Sale of Parcel SS-75, which took place on May 24,2001.
4. The Court finds that there is ample undisputed evidence that everything was done by Summit County that was reasonably calculated to give actual notice to Plaintiff of the tax sale of Parcel SS-75 on May 24, 2001, including certified and first class mail to Plaintiff's last-known record address in Sandpoint, Idaho, which was signed for by Plaintiff's wife; certified and first class mail to Plaintiff's business address, which was signed for by Plaintiff's business partner and the registered agent of Plaintiff's business; and publication in The Park Record once each week for four successive weeks immediately preceding the tax sale.
5. As to the alleged agreement between Blake Frazier and Plaintiff, the Court finds that, even accepting as true Plaintiff's allegations of fact as to the content of that agreement, Plaintiff's placing a check in the mail with only a 1¢ stamp does not constitute "mailing" and, therefore, the Court finds that Plaintiff failed to perform his end of the bargain, thereby relieving the County of an duty to perform. The same failure of performance by Plaintiff makes any argument for estoppel that would take the alleged agreement outside the statute of frauds similarly unavailing. The Court also finds that Plaintiff failed to satisfy a condition precedent, that being delivery of

payment to Summit County, and that Plaintiff's failure excused Summit County from any further performance of an alleged oral agreement.

6. In the alternative, the Court finds that Blake Frazier does not have statutory authority to make an agreement such as that alleged by Plaintiff, absent some partial redemption of the property by Plaintiff by actual receipt of money by Summit County and subsequent ratification by the Summit County Board of County Commissioners.
7. There being no disputed issues of material fact, and the Defendants having shown that they are entitled to judgment as a matter of law for the reasons set forth above and for the reasons articulated by the Court at the hearing of August 15, 2002, the Court hereby grants Summit County's Motion for Summary Judgment, dismissing Claims 1, 2, and 3 of Plaintiff's Complaint and quieting title to the property in James and Connie Sorensen.
8. The Court hereby grants Defendant James and Connie Sorensen's Motion for Summary Judgment on Claims 4 & 5, for the reasons set forth in the Sorensens' Memorandum in Support.
9. The Court hereby grants Defendant James and Connie Sorensen's Motion for Summary Judgment on Claims 6, 7 & 8, for the reasons set forth in the Sorensens' Memorandum in Support.
10. The Court hereby denies Plaintiff's Cross-Motion for Summary Judgment.
11. The Court hereby lifts the conditions imposed in this Court's Order on Motion for Preliminary Injunction.

Furthermore, for the reasons set forth above, the Court hereby makes and enters the following

JUDGMENT:

A. On Plaintiff's First Cause of Action (for Declaratory Judgment):

That Plaintiff should take nothing by his first cause of action and, instead, the Court hereby declares that the Summit County Tax Sale of Parcel SS-75 on May 24, 2001, was valid and enforceable.

B. On Plaintiff's Second Cause of Action (for Quiet Title):

That Plaintiff should take nothing by his second cause of action and, instead, the Court hereby quiets title in the property known as Parcel SS-75 in Defendants James and Connie Sorensen.

C. On Plaintiff's Third Cause of Action (for Breach of Contract):

That Plaintiff should take nothing by his third cause of action.

D. On Plaintiff's Fourth Cause of Action (for Injunctive Relief):

That Plaintiff should take nothing by his fourth cause of action.

E. On Plaintiff's Fifth Cause of Action (for Conversion and Replevin):

That Plaintiff should take nothing by his fifth cause of action.

F. On Plaintiff's Sixth Cause of Action (for Tortious Interference with Contract):

That Plaintiff should take nothing by his sixth cause of action.

G. On Plaintiff's Seventh Cause of Action (for Intentional Interference with Economic Relations):

That Plaintiff should take nothing by his seventh cause of action.

H. On Plaintiff's Eighth Cause of Action (for Forcible Entry):

That Plaintiff should take nothing by his eighth cause of action.

I. On all remaining causes of action:

That no party shall have judgment on any remaining causes of action, the same having been abandoned.

DATED: 13th Sept., 2002
s/ Honorable Robert K. Hilder
Third District Court Judge

Third District Court – Summit
2002 Sep 13 PM 4:27
File by DG

(2)

No. 04-547

Supreme Court, U.S.
FILED
NOV 19 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PAUL TRUNNELL,

Petitioner,

vs.

SUMMIT COUNTY, UTAH,
JAMES SORENSON & CONNIE SORENSON,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Utah

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMI R. BRACKIN
Counsel of Record
DAVID L. THOMAS
SUMMIT COUNTY ATTORNEY'S OFFICE
P.O. Box 128
60 North Main Street
Coalville, Utah 84017
Telephone (435) 336-3206

Attorneys for Respondent Summit County, Utah

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I Does Summit County's strict compliance with Utah's statutory noticing requirements prior to a tax sale of real property violate the due process provisions of the Fifth and Fourteenth Amendments of the U.S. Constitution?

II Does the failure of the Petitioner/Plaintiff to perform a condition precedent under an oral contract, and subsequent rejection by Summit County of the contract, violate the principles of due process and equal protection granted under the Fifth and Fourteenth Amendments of the U.S. Constitution?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Constitutional Provisions	1
Statutory Provisions	2
Statement of the Case	8
Statement of Facts	9
Summary of Argument	12
Argument	13
I. Due Process	13
II. Notice	17
A. The personal notice to the property owner Mr. Trunnell, was proper	17
B. The personal notice to third party lienholders was proper	19
C. The personal notice to the occupant of the property was proper	22
III. Oral Agreement	23
Conclusion	23

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Barrows v. Jackson, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953) 20

Dusenbery v. U.S., 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002) 13, 14, 15, 16, 21

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) 19

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706 (1983) 12, 15

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) 14

U.S. v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492 (1993) 14

Warth v. Seldin, 422 U.S. 490, 45 L.Ed.2d 343, 95 S.Ct. 2197 (1975) 20

FEDERAL COURT DECISIONS:

Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559 (10th Cir. 1993) 20

Wiren v. Eide, 542 F.2d 757 (9th Cir. 1976) 22

UTAH COURT DECISIONS:

Hall v. NACM Intermountain, Inc., 1999 UT 97, P13, 988 P.2d 942 21

Midvale City Corp. v. Haltom, 2003 UT 26, 2003 Utah LEXIS 55 20

Trunnell v. Summit County, 2004 UT App 45, *cert. denied*, 94 P.3d 929 (2004) 1, 9, 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES:

United States Constitution Amendment V..... 1, 13, 14

United States Constitution Amendment XIV..... 1, 13, 14

UTAH CODE § 59-2-1351 (1953).....*passim*

UTAH CODE § 59-2-1351.1 (1953)..... 4, 10

OPINIONS BELOW

The decision of the trial court is unreported. A copy is provided in the Petitioner's Brief as an appendix, pages a14 to a19.

The decision of the Utah Court of Appeals is unreported, but can be found in the public domain as *Trunnell v. Summit County*, 2004 UT App 45. A copy is provided in the Petitioner's Brief as an appendix, pages a3 to a13.

The decision of the Utah Supreme Court to deny certiorari is reported as *Trunnell v. Summit County*, 94 P.3d 292 (UT 2004). A copy is provided in the Petitioner's Brief as an appendix, pages a1 to a2.

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV § 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

UTAH CODE § 59-2-1351

(1)(a) Upon receiving the tax sale listing from the county treasurer, the county auditor shall select a date for the tax sale for all real property on which a delinquency exists that was not previously redeemed and upon which the period of redemption is expiring in the nearest tax sale.

(b) The tax sale shall be conducted in May or June of the current year.

(2) Notice of the tax sale shall be provided as follows:

(a) sent by certified and first class mail to the last-known recorded owner, the occupant of any improved property, and all other interests of record, as of the preceding March 15, at their last-known address; and

(b) published four times in a newspaper published and having general circulation in the county, once in each of four successive weeks immediately preceding the date of sale; or

(c) if no newspaper is published in the county, posted in five public places in the county, as determined by the

auditor, at least 25 but no more than 30 days prior to the date of sale.

(3) The notice shall be in substantially the following form:

NOTICE OF TAX SALE

Notice is hereby given that on ___ (month\day\year), at __ o'clock __. m., at the front door of the county courthouse in ____ County, Utah, I will offer for sale at public auction and sell to the highest bidder for cash, under the provisions of Section **59-2-1351.1**, the following described real property located in the county and now delinquent and subject to tax sale. A bid for less than the total amount of taxes, interest, penalty, and administrative costs which are a charge upon the real estate will not be accepted.

(Here describe the real estate)

IN WITNESS WHEREOF I have hereunto set my hand and official seal on ___ (month\day\year).

_____

County Auditor

_____

County

(4)(a) The notice sent by certified mail in accordance with Subsection (2)(a) shall include:

(i) the name and last-known address of the last-known recorded owner of the property to be sold;

(ii) the parcel, serial, or account number of the delinquent property; and

(iii) the legal description of the delinquent property.

(b) The notice published in a newspaper in accordance with Subsection (2)(b) shall include:

(i) the name and last-known address of the last-known recorded owner of each parcel of property to be sold; and

(ii) the street address or the parcel, serial, or account number of the delinquent parcels.

UTAH CODE § 59-2-1351.1

(1)(a) At the time specified in the notice the auditor shall:

(i) attend at the place appointed, offer for sale, and sell all real property for which an acceptable bid is made; and

(ii) refuse to offer a parcel of real property for sale if the description of the real property is so defective as to convey no title.

(b) The auditor may post at the place of sale a copy of the published list of real property to be offered and cry the sale by reference to the list rather than crying each parcel separately.

(2)(a) The tax commission shall establish, by rule, minimum procedural standards applicable to tax sales.

(b) For matters not addressed by commission rules, the county legislative body, upon recommendation by the county auditor, shall establish procedures, by ordinance, for the sale of the delinquent property that best protect the financial interest of the delinquent property owner and meet the needs of local governments to collect delinquent property taxes due.

(3) The county governing body may authorize the auditor to combine for sale two or more contiguous parcels owned by the same party when:

(a) the parcels are a single economic or functional unit;

(b) the combined sale will best protect the financial interests of the delinquent property owner; and

(c) separate sales will reduce the economic value of the unit.

(4) The governing body may accept any of the following bids:

(a) the highest bid amount for the entire parcel of property, however, a bid may not be accepted for an amount which is insufficient to pay the taxes, penalties, interest, and administrative costs; or

(b) a bid in an amount sufficient to pay the taxes, penalties, interest, and administrative costs, for less than the entire parcel.

(i) The bid which shall be accepted shall be the bid of the bidder who will pay in cash the full amount of the taxes, penalties, interest, and administrative costs for the smallest portion of the entire parcel.

(ii) The county auditor at the tax sale or the county legislative body following the tax sale shall reject a bid to purchase a strip of property around the entire perimeter of the parcel, or a bid to purchase a strip of the parcel which would prevent access to the remainder of the parcel by the redemptive owner or otherwise unreasonably diminish the value of that remainder.

(iii) If the bid accepted is for less than the entire parcel, the auditor shall note the fact, with a description of the property covered by the bid, upon the tax sale record and the balance of the parcel not affected by the bid shall be considered to have been redeemed by the owner.

(5) The county legislative body may decide that none of the bids are acceptable.

(6) Once the county auditor has closed the sale of a particular parcel of property as a result of accepting a bid on the parcel, the successful bidder or purchaser of the property may not unilaterally rescind the bid. The county legislative body, after acceptance of a bid, may enforce the terms of the bid by obtaining a legal judgment against the purchaser in the amount of the bid, plus interest and attorney's fees.

(7) Any sale funds which are in excess of the amount required to satisfy the delinquent taxes, penalties, interest, and administrative costs of the delinquent property shall be treated as unclaimed property under Title 67, Chapter 4a, Unclaimed Property Act.

(8) All money received upon the sale of property made under this section shall be paid into the county treasury, and the treasurer shall settle with the taxing entities as provided in Section **59-2-1366**.

(9)(a) The county auditor shall, after acceptance by the county governing body, and in the name of the county, execute deeds conveying in fee simple all property sold at the public sale to the purchaser and attest this with the auditor's seal. Deeds issued by the county auditor under this section shall recite the following:

(i) the total amount of all the delinquent taxes, penalties, interest, and administrative costs which were paid in for the execution and delivery of the deed;

(ii) the year for which the property was assessed, the year the property became delinquent, and the year the property was subject to tax sale;

(iii) a full description of the property; and

(iv) the name of the grantee.

(b) When the deed is executed and delivered by the auditor, it shall be prima facie evidence of the regularity of all proceedings subsequent to the date the taxes initially became delinquent and of the conveyance of the property to the grantee in fee simple.

(c) The deed issued by the county auditor under this section shall be recorded by the county recorder.

(d) The fee for the recording shall be included in the administrative costs of the sale.

(e) The deed shall be substantially in the following form:

TAX DEED

___ County, a body corporate and politic of the state of Utah, grantor, hereby conveys to ___, grantee, of ___ the following described real estate in ___ County, Utah:

(Here describe the property conveyed)

This conveyance is made in consideration of payment by the grantee of $___, representing the total amount owing for delinquent taxes, penalties, interest, and administrative costs constituting a charge against the real property

for nonpayment of general taxes assessed against it for the years ___ through ___ in the sum of $___.

Dated ___ (month\day\year).

(Auditor's Seal)

County _____

By _____
County Auditor

STATEMENT OF THE CASE

This matter arose out of a tax sale conducted by Summit County on May 24, 2001. As a result of delinquent taxes, Summit County sold property owned by the Petitioner, Paul Trunnell, and identified as parcel number SS-75, for the sum of $31,000 to James and Connie Sorenson, the co-Respondents.

On June 14, 2001, after hearing an objection from Mr. Trunnell, the Summit County Board of County Commissioners ("BCC") ratified the tax sale and a tax deed was subsequently issued by the Auditor to the Respondents Sorenson for parcel SS-75.

On June 16, 2001, Mr. Trunnell filed his complaint in the district court of Utah seeking to set aside the tax sale among other claims, and naming Summit County and James and Connie Sorenson as defendants.

After discovery, the Parties' Cross Motions for Summary Judgment came before the trial court on August 15, 2002 (R. 1072-1158) at which time the trial court ruled in favor of Respondents Summit County and the Sorensons,

declaring the tax sale valid as a matter of law, and entering judgment on all claims in favor of Summit County and the Sorensons. A final Order was entered on September 13, 2002 (R. 1023-1029).

Mr. Trunnell appealed the order of the district court to the Utah Court of Appeals which heard the case on February 20, 2004. An unpublished Memorandum Decision was issued March 4, 2004 and is cited in the public domain as *Trunnell v. Summit County*, 2004 UT App 45. The decision of the Court of Appeals affirmed the grant of summary judgment by the trial court in all respects. Thereafter the petitioner sought a writ of certiorari from the Utah Supreme Court, which petition was denied on July 19, 2004. *Trunnell v. Summit Co.*, 94 P.3d 929 (UT 2004).

STATEMENT OF FACTS

1. Prior to May 24, 2001, Paul Trunnell was the owner of a single parcel of land consisting of 87.73 acres and located entirely within Summit County, Utah, with a Summit County tax identification of parcel number SS-75 (the "Property"). (R. 0002, 0497)

2. Commencing in 1996 and for a period of five (5) consecutive years, the taxes assessed on the Property were delinquent and went unpaid. (R. 0019)

3. On January 23, 2001, a delinquent tax billing statement was sent by the Summit County Treasurer to Paul Trunnell notifying him of the five (5) year tax delinquency for parcel SS-75 in the total amount of six thousand sixty-five dollars and forty-nine cents ($6,065.49) which sum was due in full on or before March 15, 2001. (R. 0019) This billing statement was not a notice of tax sale under Utah

law, and Respondent Summit County specifically objects to the petitioner's characterization of this billing statement as the official tax sale notice.

4. Paul Trunnell received the tax billing statement prior to March 15, 2001. (R. 0003, 0019, 1328)

5. No payment for delinquent taxes on the property was made prior to March 15, 2001. (R. 0003, 0019, 1328) Mr. Trunnell knew that the taxes were due, yet knowingly did not pay the taxes in a timely manner. (R. 1326, 1377)

6. The delinquent tax notice sent by the Summit County Treasurer in January 2001, contained an additional courtesy notice of the tax sale for those parcels with a five (5) year delinquency. However, the Auditor's office had not yet determined the exact date on which the 2001 annual tax sale would be held, so in the courtesy notice, the Treasurer estimated the date to be May 31, 2001. (R. 0152-0153)

7. Blake Frazier is the duly elected Summit County Auditor, charged with the task of performing tax sales pursuant to UTAH CODE ANN. §§ 59-2-1351 and 1351.1. (R. 0152)

8. In early April, 2001, the County Auditor, Blake Frazier, determined that the Summit County tax sale would be held on May 24, 2001. (R. 0153)

9. From April 28, 2001 through May 19, 2001, Blake Frazier published notice of the tax sale in *The Park Record*, a newspaper of general circulation within Summit County, for a period of four (4) weeks, and in the manner prescribed by UTAH CODE ANN. § 59-2-1351(2). (R. 0153, 0157)

10. On April 30, 2001, the Auditors office sent a Notice of Tax Sale on the Property to Paul Trunnell via certified and first class mail through the U.S. Postal Service as

required by Utah law. The return receipt for the Notice of Tax Sale was signed by the Petitioner's wife, Bobbi Trunnell with the return receipt postmarked for return to Blake Frazier on May 7, 2001. (R. 0153, 0169, 1367-1368)

11. On April 30, 2001, additional notifications were sent by the auditor to Paul J. Trunnell at P.O. Box 66, Heber City, Utah 84032 (returned undelivered). All other interested parties were sent notices including: Founders Title Company at P.O. Box 680845, Park City, Utah 84068 (signed for by Brian K. Peterson); O. Lamont & Shirley D. Heath, Equity Exchange, Inc. Employees Pension at P.O. Box 57588, Murray, Utah 84157 (returned undelivered); and Old Republic Title Company at P.O. Box 66, Heber City, Utah 84032 (returned undelivered). Finally, notice was sent to the occupant of the land, Park City Stone c/o Paul Trunnell, P.O. Box 1270, Midvale, Utah 84049 (signed for by Gary Campbell).

12. The Notice of Tax Sale sent to Paul Trunnell was in a form which complied with the requirements of UTAH CODE ANN. § 59-2-1351(3).

13. Sometime around May 15, 2001, Paul Trunnell telephoned Blake Frazier regarding the Notice of Tax Sale of the Property. Mr. Trunnell confirmed to Blake Frazier that he had received notice of the tax sale, and asked whether there was any way to postpone or cancel the sale with respect to the Property. Mr. Trunnell was informed that Summit County would postpone the tax sale if the property owner made a substantial payment on the delinquent taxes, and further agreed to pay the entire delinquent tax balance within 30 days. (R. 0003, 0154)

14. No payment for the delinquent taxes on the Property was received by Summit County from Mr. Trunnell or

any other person on his behalf, prior to May 24, 2001. (R. 0003, 1330-1331, 1343, 1391)

15. No redemption of the Property either partially or in whole, was made pursuant to Utah law prior to the tax sale on May 24, 2001 or prior to the ratification of the tax sale by the Summit County Board of County Commissioners on June 14, 2001.

16. On May 24, 2001, a tax sale of the Property was conducted as noticed. Connie Sorenson appeared and was the highest bidder on the Property and therefore, the Property was sold to Connie and James Sorenson in accordance with statutory requirements. (R. 0004).

17. On June 14, 2001, after hearing from Paul Trunnell and the Summit County Assessor and having received no proof of payment by Mr. Trunnell toward the delinquent taxes, the Summit County Board of County Commissioners ratified the sale of the Property to the Sorensons. (R. 0005-0006, 0114)

18. On or about June 15, 2001, a Tax Deed was issued by Summit County to James and Connie Sorenson as the record title holders of the Property. (R. 0116).

SUMMARY OF ARGUMENT

The Petitioner/Plaintiff, Mr. Trunnell, seeks review by this Court based upon an allegation that the decision of the Utah Court of Appeals, and subsequent denial of certiorari by the Utah Supreme Court, is in conflict with the due process requirements set forth in this Court's decision of *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706 (1983). It is the position of Summit County that the issues raised in the *Mennonite* decision and in this Petition, have been addressed by this

Court's subsequent decision of *Dusenbery v. U.S.*, 534 U.S. 161, 122 S.Ct. 694, 151 L.Ed.2d 597 (2002). The application of the rule of law regarding due process by the trial court and affirmation by the Utah Court of Appeals was correct.

The tax sale notification scheme set forth in the Utah Code, for property owners and all other parties interested in the real property to be sold, is designed to apprize all interested parties of the pendency of the tax sale of real property and to afford them an opportunity to present their objections to the sale. Summit County's strict compliance with the statutory notification requirements did not deprive the property owner, Mr. Trunnell, nor any other party with an interest in the property, including third party lienholders and occupants of the land, of due process and did not violate the constitutional protections afforded in the Due Process clause of the Fourteenth Amendment of the U.S. Constitution.

Further, Summit County's refusal to honor an oral agreement for which performance of a condition precedent was required by Mr. Trunnell, but not performed, did not deprive Mr. Trunnell of due process and did not violate the constitutional due process protections afforded in the Fifth and Fourteenth Amendments of the U.S. Constitution.

ARGUMENT

I. Due Process

Mr. Trunnell claims that the noticing provisions set forth in the Utah Code are violative of his due process rights unless the notice is actually received by the property

owner in a reasonable time prior to the sale, and unless there is a specified number of days prior to the sale for which notice must be published, the statute is invalid. Further, Mr. Trunnell argues that rather than sending notice by certified mail as prescribed, the notice must be sent via "restricted delivery" to the property owner; otherwise due process is violated.

The Due Process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, prohibit governments from taking citizens' property without "due process" of law. That term has been interpreted as giving individuals "'notice and an opportunity to be heard'". *Dusenbery v. U.S.*, 534 U.S. 161, 167, 151 L.Ed.2d 597, 122 S.Ct. 694 (2002) (*quoting U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 48, 126 L.Ed.2d 490, 114 S.Ct. 492 (1993)).

This Court has articulated the standard by which claims of insufficient notice to a government's action shall be measured. That standard is notice which is "'reasonably calculated, under all the circumstances, to apprize the interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Dusenbery*, 534 U.S. at 168, 173 (*quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 319, 94 L.Ed. 865, 70 S.Ct. 652 (1950)).

Thus, the question is not whether or not Mr. Trunnell personally received the notice or whether restricted delivery or actual personal notice (actual receipt of notice) should be required by the statute. Rather, the question is whether the notice required under Utah's statutory scheme is reasonably calculated to apprize Mr. Trunnell of the pending action, thus affording him reasonable time and opportunity to present objections to the sale.

In *Dusenbery*, this Court expressly rejected an argument similar to that of the Petitioner, when affirming the forfeiture of items seized during the execution of a criminal warrant. The government notified Mr. Dusenbery by sending written notice via certified mail to the correctional facility in which he was incarcerated. The mail was received by prison mail room staff, who signed the signature card. Following procedure, the employee entered the mail into a log book then had another staff member distribute the mail to the inmate. In addition to the certified mail to the correction facility, the government also sent written notice via certified mail to his last known address (the address where the search and seizure took place); and also an address in Ohio where his mother lived. The government also followed the statutory requirements by publishing the notice in a newspaper of general circulation in the district in which the forfeiture proceeding was brought, for a period of at least three successive weeks.

As in the instant case, the petitioner in *Dusenbery* argued that due process requires "actual notice" and (as in this case) cited the case of *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 796-797, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) to support that claim. However, this Court rejected that argument stating that the *Mennonite* case stood for the proposition that the government is ***not*** required to "provide actual notice, but it must ***attempt*** to provide actual notice." *Dusenbery*, 534 U.S. at 170 [emphasis added]. This Court went further to say that "none of our cases . . . has required actual notice in proceedings such as this." *Id.*

The similarities between *Dusenbery* and this case are numerous. In the instant case, the government not only

sent notice to Mr. Trunnell at his last known address, which was received by his wife, the government also sent notice to several other addresses including a business address where too, the notice was received by Mr. Trunnell's business agent, Gary Campbell. (R. 0975-0981) As in *Dusenbery*, the government also published notice in a manner and for the duration required by law.

As for whether notice sent on April 30, 2001 was sufficiently timely to afford Mr. Trunnell the opportunity to be heard prior to or on May 24, 2001, the record shows that the notice was mailed and received in a timely manner. Mr. Trunnell's wife, Bobbi Trunnell received and signed for the notice sometime on or before May 7, 2001 (the date of the Idaho postmark on the return receipt). Mr. Trunnell thereafter called the Auditor on May 15, 2001, and talked of postponing the sale, thus indicating knowledge of the sale. Finally, the return receipt with Mrs. Trunnell's signature was postmarked for return to the County on May 7, 2001 and was received by the Auditor's office prior to the sale all indicating that the notice had been received in sufficient time prior to the sale and giving Mr. Trunnell notice and an opportunity to appear and present objections. (R. 0969, 1138-1139)

Looking at the totality of the circumstances, the notice in the instant case was reasonably calculated to notify Mr. Trunnell of the pending action, was an attempt by the County to provide actual notice, was given in a timely manner and Mr. Trunnell cannot show in what manner due process was violated. As a result, the trial court correctly ruled that there were no due process violations, which decision was upheld by the Utah Court of Appeals with certiorari denied by the Utah Supreme

Court. *Trunnell v. Summit County*, 2004 UT App 45, *cert. denied*, 94 P.3d 929 (2004).

II. Notice

The notification requirements set forth in UTAH CODE ANN. § 59-2-1351 (1953), establish three (3) pre-requisite duties which the auditor must meet prior to conducting a tax sale. First, the Auditor must send the Notice of Tax Sale by certified first class mail to the last-known recorded owner of the property, the occupant of any improved property, and "all other interests of record as of the preceding March 15, at their last known address". UTAH CODE ANN. § 59-2-1351(2)(a). Second, the notice must be published four times in a newspaper of general circulation within the county, at least one time in each of four successive weeks immediately preceding the date of the sale. UTAH CODE ANN. § 59-2-1351(2)(b). Third, the notice itself must be in a form substantially similar to that prescribed in the Utah Code. UTAH CODE ANN. § 59-2-1351(3). If these three requirements are strictly complied with, then under Utah law the sale of real property is valid as a matter of law. In his petition to this Court, Mr. Trunnell does not challenge the published notice or the form of the notice. He challenges only the personal or mailed notice to the property owner, the lienholder and the occupant of the land.

A. The personal notice to the property owner Mr. Trunnell, was proper

On April 30, 2001, the Notice of Tax Sale was sent by certified and first class mail to Paul Trunnell, who was the owner of the Property, with an address of 769 Lower Pack

River Road, Sandpoint, Idaho 83864-4992. The return receipt for the Notice of Tax Sale was signed by Bobbi Trunnell, who is Paul Trunnell's wife and with whom he resides. (R. 1320) After obtaining Mrs. Trunnell's signature, the return receipt was mailed back to Summit County with an Idaho postmark of May 7, 2001. On May 15, 2001, Paul Trunnell contacted the Summit County Auditor, Blake Frazier, by telephone, acknowledging that he knew of the forthcoming tax sale and asked for a continuance of the sale. (R. 0003, 0154)

Additional notifications were sent by the auditor to Paul J. Trunnell at P.O. Box 66, Heber City, Utah 84032 (returned undelivered); Founders Title Company at P.O. Box 680845, Park City, Utah 84068 (signed for by Brian K. Peterson); O. Lamont & Shirley D. Heath, Equity Exchange, Inc. Employees Pension at P.O. Box 57588, Murray, Utah 84157 (returned undelivered); Old Republic Title Company at P.O. Box 66, Heber City, Utah 84032 (returned undelivered); and the occupant of the land, Park City Stone c/o Paul Trunnell, P.O. Box 1270, Midvale, Utah 84049 (signed for by Gary Campbell).

All statutory notification requirements were met by Summit County. Although Mr. Trunnell contends that he did not personally receive the notice sent on April 30, 2001 to the address in Sandpoint, Idaho and signed for by his wife, Bobbi Trunnell prior to the sale, this contention without merit since "actual receipt" is not required under the law. All that is required is that the Notice be sent via U.S. first class and certified mail to the last known address. UTAH CODE ANN. § 59-2-1351(2)(a). Mr. Trunnell acknowledges receipt of the January 23, 2001 Tax Billing at the address in Sandpoint, Idaho. As the last known address, this address was used to send the Notice of Tax

Sale by the Summit County Auditor. Bobbi Trunnell, the Appellant's wife with whom he resides, received the notice and the receipt with her signature was returned to the County all prior to the tax sale. (R. 1111) Having had sufficient time in which to receive the Notice, sign for it and have the return receipt received back by Summit County, the statutory provisions of personal notice were met and the trial court correctly ruled that the notice was sufficient as a matter of law, and that Mr. Trunnell had personal notice as a matter of law. (R. 1060).

B. The personal notice to third party lienholders was proper

In another effort to overcome the validity of the tax sale, Mr. Trunnell attempts to challenge the notice sent to a secured creditor and lienholder of the property who was not a party to the action in the trial court. Although the lienholder has not challenged the noticing (*see* R. 0697-0699). Mr. Trunnell nevertheless attempts to do so. Summit County asserted before the trial court and appellate court, that Mr. Trunnell has no standing to challenge the notice to the lienholder and maintains that argument. (R. 1135-1136) The lienholder was not made a party to the proceedings below and unless Mr. Trunnell demonstrates affirmatively why he has standing to challenge the notice, Summit County continues to assert that Mr. Trunnell lacks standing to make this claim.

> "It is the burden of the 'party who seeks the exercise of jurisdiction in his favor' [to clearly allege] facts essential to show jurisdiction. If [it] fails to make the necessary allegations, [it has] no standing" *FW/PBS, Inc. v. City of Dallas*, 493 U.S.

> 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990) (citations omitted).

Midvale City Corp. v. Haltom, 2003 UT 26, P12, 2003 Utah LEXIS 55.

> [O]ne does not have standing to assert a violation of rights belonging to another, since the person entitled to a right is the only one who can be directly injured by its deprivation. See *Warth*, 422 U.S. at 499 [*Warth v. Seldin*, 422 U.S. 490, 501, 45 L.Ed.2d 343, 95 S.Ct. 2197 (1975)] (a litigant "must assert his own legal rights"); *Barrows v. Jackson*, 346 U.S. 249, 255, 97 L.Ed. 1586, 73 S.Ct. 1031 (1953).

Doyle v. Oklahoma Bar Ass'n, 998 F.2d 1559, 1566 (10th Cir. 1993).

In the event a 3rd party challenge can be made to the notice given to the lienholder, it is clear that the notice to the lienholder, Equity Exchange Inc. Employee's Pension Trust (hereinafter "Heath Trust"), was sufficient and that the provisions of the statute were strictly followed. As with notice to Mr. Trunnell, actual notice to the Heath Trust is not required and the claim, therefore, must fail. Rather, it is notice sent pursuant to the statutory provisions that is required which provisions were met by Summit County.

The notice of tax sale was sent to the last known address of the Heath Trust. (R. 1001-1007) The notice was returned to the County undelivered based upon the death of the Trustee and subsequent closure of the known post office box with no forwarding address. (R. 1007, 1119) Further, notice was published pursuant to UTAH CODE ANN. § 59-2-1351(2). Actual notice to the trust was not required, rather, the notice must be reasonably calculated

to apprize the Heath Trust of the pending action and afford them an opportunity to respond. *Dusenbery*, 534 U.S. at 168. Given the efforts made and use of more than one noticing provisions, the notice to the Heath Trust was reasonably calculated to notify them of the pending action and it can be said that Summit County did everything in it's power to apprize the Heath Trust of the impending sale.

Further, when addressing the issue of notification to creditors before a tax sale, the Utah Supreme Court in *Hall v. NACM Intermountain, Inc.*, 1999 UT 97, P13, 988 P.2d 942, 946 stated: " . . . parties who fail to take the steps necessary for receiving notice waive their constitutional protection and are not entitled to notice [citations omitted]." Thus, creditors such as the Heath Trust, must record and keep their contact information current with the County if they expect to be notified of tax sale proceedings or other proceedings on the property. The fact that the Trustee had recently passed away and his daughter had closed the post office box listed as the official address on all county records, and had not recorded or given notice of any forwarding address would not be known to the County. (R. 1119) The Auditor is obligated to notify the creditors at the address on the recorded documents and it is undisputed that such notification was sent via certified mail and although the notice was returned without any forwarding information, the statutory obligation of the Auditor was fulfilled. Additionally, the posted and published notice were sufficient to put any successor in interest of the Heath Trust on notice of the tax sale. *Id.*

C. The personal notice to the occupant of the property was proper

Appellant, Mr. Trunnell, asserts that the notice given to the occupant of the land, Park City Stone, was somehow deficient. Although Mr. Trunnell acknowledges that notice was sent in the form prescribed by law prior to the sale, and acknowledges that the occupant Park City Stone actually received the notice prior to the sale, Mr. Trunnell nonetheless argues that the occupant's receipt of the notice twenty-three days prior to the sale renders the sale invalid. (R. 1389-1390) This argument is without merit.

> [A claimant's] receipt of actual notice deprives him of standing to raise the claim [of a due process violation] . . . Having received such notice, [a claimant] has clearly been accorded due process in the application of the statute as to him personally.

Wiren v. Eide, 542 F.2d 757, 762 (9th Cir. 1976).

Notice was sent to the Appellant, Mr. Trunnell, in care of the occupant Park City Stone. The notice was actually received by Mr. Trunnell's business agent, Gary Campbell, (R. 1368-1369) prior to the sale, thus giving both Mr. Trunnell and the occupant actual notice of the sale, prior to the sale. (R. 1389-1390) The fact that Appellant now asserts that receiving actual notice of the sale twenty-three days prior to the sale is somehow deficient is contrary to law and without merit. The occupant, Park City Stone was afforded all due process considerations required by law and was given notice prior to the sale of the impending action with all opportunities to be heard.

III. Oral Agreement

The refusal of Summit County to honor an oral agreement after the condition precedent was not performed by the Petitioner/Plaintiff does not violate due process when the law on contracts is correctly stated and applied.

The trial court, after briefing and argument by counsel, found that Mr. Trunnell failed to perform his end of the oral agreement which was a condition precedent to the contract, thereby relieving Summit County of any duty to perform under the agreement. (Petitioner's Brief, Appendix at page a16). The trial court also rejected the equitable claims of Mr. Trunnell regarding the agreement. (Petitioner's Brief, Appendix at page a16).

On appeal to the Utah Court of Appeals, the appellate court found that the ruling of the trial court regarding the oral contract was correct. (Petitioner's Brief, Appendix at page a7).

The findings and application of the law on oral contracts was correct and as such the Utah Supreme Court denied the petition for certiorari. The correct application of the properly articulated law, does not provide a basis for this Court, in its discretion, to grant certiorari.

CONCLUSION

There is no basis for a Writ of Certiorari to issue from this Court. The issues are neither those of first impression, nor are they unique. The decision of the Utah Court of Appeals is not in conflict with any previous decision of any court, and has not deviated from any acceptable

standards or practices. Further, there is no error of law which would support the issuance of a Writ of Certiorari.

The tax sale held by Summit County on May 24, 2001 was valid as a matter of law. The notice which was both published pursuant to law, and which was sent via certified mail to the Petitioner, pursuant to law, was reasonably calculated to apprize Mr. Trunnell and all creditors or other interested parties of the pending action and afford them an opportunity to be heard.

The oral contract between Mr. Trunnell and Summit County is unenforceable as a matter of law. The failure of the Petitioner to perform under the contract excused Summit County from performing their obligation and continuing the tax sale.

Having no violations of due process or other basis on which this Court in its discretion should support the issuance of a Writ of Certiorari, the Petition of Mr. Trunnell should be denied.

RESPECTFULLY SUBMITTED this 19th day of November, 2004.

JAMI R. BRACKIN
Counsel of Record
DAVID L. THOMAS
SUMMIT COUNTY ATTORNEY'S OFFICE
P.O. Box 128
60 North Main Street
Coalville, Utah 84017
Telephone (435) 336-3206

Attorneys for Respondent Summit County, Utah

(3)

No. 04-547

Supreme Court, U.S.
FILED
DEC 30 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PAUL TRUNNELL,

Petitioner,

vs.

SUMMIT COUNTY, UTAH,
JAMES SORENSON & CONNIE SORENSON,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Utah

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

B. RAY ZOLL
Counsel of Record
ZOLL & TYCKSEN, L.C.
5300 South 360 West
Suite 360
Murray, UT 84123
Telephone (801) 685-7800

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Facts	1
Argument	4
I. The Due Process Prong	5
II. The Equal Protection Prong	7
III. Customary Safeguards Of American Law Were Violated Here	8
A. No Review Process	8
B. Right Of Trial Was Lost	9
Conclusion	9

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Dunsbery v. U.S., 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002) 6

Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983) 5

STATE COURT DECISIONS:

Fulton v. Cornelius, 758 P.2d 312 (N.M. Ct. App. 1988) 5

Rivera v. Carbon County Tax Claim Bureau and Jason Keller, 857 A.2d 208 (Pa. Commw. Ct. 2004) 5

Topps v. County of Walworth, 659 N.W.2d 177 (Wis. Ct. App. 2003) 5

UTAH COURT DECISIONS:

Fivas v. Petersen, 300 P.2d 635 (Utah 1956) 5

STATUTE:

Utah Code Ann. § 59-2-1351 (1953) 2

MISCELLANEOUS:

Utah Rules of Civil Procedure 59 9

Utah Rules of Civil Procedure 60(b) 6

INTRODUCTION

Respondents' Brief in Opposition underscores the reason this Honorable Court needs to review this case. The Petitioner, Paul Trunnell, represents Americans everywhere who work their entire life to fulfill the American dream of property ownership only to lose it through the unfettered discretion of county employees who ignore their duties in a quest to collect taxes. Americans like Paul Trunnell, common working class people unable to hire expensive lawyers to protect their constitutional rights, "kick against the mighty Sovereign" with little chance of protection.

STATEMENT OF FACTS

In an attempt to justify the County's conduct, Respondents' Brief in Opposition misconstrues or omits the following significant facts:

1. Prior to May 24, 2001, Petitioner Paul Trunnell was the *sole* fee title owner of approximately eighty-eight (88) acres of land located within Summit County, Utah. (R. 2; 100; 113; 116; 1392:10-12)

2. On January 23, 2001, the Summit County Treasurer sent Petitioner a Delinquent Tax Billing statement that contained the following notice of tax sale:

> In accordance with Utah Code 59-2-1343 to 59-2-1351, after March 15, 2001 your property will be sold at public auction for non-payment of taxes. This sale will be held at the Summit County Courthouse on May 31, 2001. (R. 830).

3. The Delinquent Tax Billing was the only tax sale notice Petitioner actually received prior to the May 24, 2001 tax sale, and Petitioner relied on it to his detriment. (R. 825:¶3-826:¶8)

4. In early April 2001, the Summit County Auditor, Blake Frazier, unilaterally determined that the Summit County tax sale would be held on May 24, 2001, one week before the prior noticed date. (R. 517:5-519:14)

5. On April 30, 2001, the Summit County Auditor caused a changed Notice of Tax Sale to be prepared and mailed by certified and first class mail to Petitioner at, among other places, PO Box 66, Heber City, Utah, which was not received by Petitioner and was returned to the County by the U.S. Postal Service, marked "Return to Sender." (R. 552:¶5; 560; 852)

6. Another copy of the changed Notice of Tax Sale was sent to Petitioner by certified and first class mail to 769 Lower Pack River Road, Sandpoint, Idaho. (R. 849, Exhibit "I")

7. The Clark Fork, Idaho Post Office stamped the Notice of Tax Sale on May 7, 2001, indicating that it arrived in Clark Fork, Idaho on or before May 7, 2001, and it was "sometime thereafter" delivered to Bobbi Trunnell. (R. 849) This changed notice was signed for by "Bobbi Trunnell" without date. (R. 849, Exhibit "I")

8. Summit County did not know who Bobbi Trunnell was or her relationship to Petitioner, but did know that she was not the fee title "owner" of the property as mandated by Utah Code Ann. § 59-2-1351. (R. 866:2-5; 869:9-23)

9. There is nothing in the record that reflects that Bobbi Trunnell received the Notice of Tax Sale prior to May 24, 2001.

10. Petitioner, the owner of the property, did not receive the changed Notice of Tax Sale prior to the sale of his property. (R. 826:¶8; 978-979)

11. Summit County alleges that Mr. Trunnell's business agent, Gary Campbell, signed for the certified letter thus giving Mr. Trunnell notice. However, Mr. Campbell was a mere part-time bookkeeper for Park City Stone and not a business agent. There is no evidence that Mr. Campbell ever delivered the County's changed notice to Mr. Trunnell. (R. 1368-1369)

12. Believing the tax sale was set for May 31, 2001 as noticed to him, Petitioner called Blake Frazier on May 15, 2001 to discuss postponement or cancellation of the pending sale. Petitioner neither called about the changed Notice of Tax Sale nor confirmed to Mr. Frazier that he had received the changed Notice of Tax Sale. (R. 824:4-826)

13. Mr. Frazier has acted with the express, implied, or apparent discretionary authority of Summit County for years to enter into agreements with taxpayers to postpone the tax sale of their property and has done so without written memorialization. (R. 880:6-885:3; 825:¶5; 885:7-25; 904-925)

14. Mr. Frazier told Petitioner that he would postpone the sale if Petitioner would make a substantial payment of $2,000.00 on the delinquent taxes by mail and pay the entire delinquent balance within 30 days. (R. 825-826)

15. Mr. Frazier did not tell Petitioner that he had to make payment of the $2,000.00 before May 24, 2001, but merely told him that he needed to mail it in. (R. 825:¶5)

16. Relying upon Mr. Frazier's word, and believing that the May 31, 2001 tax sale had been postponed, Petitioner wrote a check for $2,000.00 and sent it to Summit County on May 16, 2001. (R. 825:¶¶4-6; 818-819)

17. The partial payment from Petitioner of taxes on SS-75 never reached Summit County because Petitioner accidentally put a one (.01) cent stamp on the envelope. The U.S. Post Office subsequently lost the envelope, resulting in its delayed return to Petitioner. (R. 4:¶15; 818-819, Exhibit "J"; 825:¶6-826; 1343:5-1344:6)

18. On or about May 21, 2003, Petitioner called Mr. Frazier to see if he had received the $2,000.00 check, and got a recording. Petitioner left a message and phone number, and told Mr. Frazier he had sent the check for $2,000.00, was working on getting the financing for the remaining $4,000.00 he owed Summit County, and left his phone number if there were any questions. (R. 4:¶17; 1342:12-1343:14)

19. Unbeknownst to Petitioner, on May 24, 2001, the Summit County Auditor, without even a phone call to Petitioner, sold the entire eighty-eight (88) acre property to James and Connie Sorenson as bidders at the tax sale. (R. 553:¶8; 570-573; 520:14-24; 521:13-23)

ARGUMENT

There are three prongs to Petitioner's constitutional argument in this case: Due Process, Equal Protection, and the right to a trial before one's peers. Respondents' Brief in Opposition addresses the "notice" aspect of Petitioner's Due Process argument, but fails to address the remaining arguments. Petitioner respectfully draws this Court's

attention to the following Due Process and Equal Protection claims.

I. The Due Process Prong

The primary purpose of real estate tax sale laws is to ensure the collection of taxes, not to deprive citizens of their property rights. *See Rivera v. Carbon County Tax Claim Bureau,* 857 A.2d 208 (Pa. Cmwlth. App. 2004). To guard against the deprivation of property without due process of law, courts throughout the United States require strict compliance with tax sale notice provisions. *See Topps v. County of Walworth*, 659 N.W.2d 177 (Wis. App. 2003); *Fulton v. Cornelius*, 758 P.2d 312 (N.M. App. 1988); and *Fivas v. Petersen*, 300 P.2d 635 (Utah 1956).

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), this Court invalidated a tax sale where a mortgagee was only given published notice of the tax sale and not personal notice. In so doing, the Court stated:

> Notice by mail or other means as ***certain to ensure actual notice*** is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter "was the information which the [County] was constitutionally obliged to ***give personally*** to the appellant[.]"

Id. at 800 (quoting *Schroeder v. City of New York,* 371 U.S. 208, 214 (1962)) (Emphasis added).

Respondents argue that the case of *Dusenbery v. U.S.*, 122 S.Ct. 694, 534 U.S. 161, 151 L.Ed. 2d 597, is similar to and governs this case. Contrary to this argument, *Dusenbery* does not concern a county's tax sale, did not require a strict compliance standard, did not deal with the sale of real property, and did not require the interpretation of a statute stating that notice "shall" be "sent by certified and first class mail to the last-known recorded owner." The forfeiture and sale of real property by tax sale is different from the administrative forfeiture of cash seized during a search of a residence, as occurred in *Dusenbery*, and is treated differently by State and Federal courts.

The Utah tax sale statute establishes a "reasonable man" standard. If it is not absolutely clear that the statutory notice requirements have been met, then the County had the duty to postpone the sale. Summit County abused this standard by having ample evidence of problematic issues and selling Petitioner's property anyway. A simple postponement – as often occurs – would have been fair and reasonable. Yet the County wanted to "flex its muscle."

The law of this land with regard to tax sales ought to be "actual" notice (certified mail by restricted delivery) or the sale should be postponed, particularly in cases such as this where the first notice was wrong. Restricted delivery ensures that mail is delivered to the person specified and requires that the addressee sign for it.

In the context of a tax sale in Utah, if an owner does not receive actual notice, it results in the permanent loss of that person's real property because one cannot set aside a tax sale pursuant to Rule 60(b) for mistake, inadvertence, surprise or excusable neglect. Due Process should require the State to provide property owners actual,

personal notice by restricted delivery, so that the last-known recorded owner receives notice prior to a tax sale. At the least, the State should be required to motion the Court for notice by publication.

II. The Equal Protection Prong

The Summit County Auditor does not have statutory direction to make agreements to postpone tax sales. However, Summit County's informal policy gives the Auditor unfettered authority to postpone, extend, or otherwise defer a tax sale without any ascertainable standards. Such discretion can be abused. The Auditor should not be able to renege on informal agreements to the detriment of the taxpayer, as occurred here.

On May 15, 2001, Petitioner reached an oral agreement with the Summit County Auditor to postpone the tax sale. During a telephonic conversation on May 15, 2001, Blake Frazier promised Petitioner that the tax sale would be postponed if Petitioner would make a substantial payment of $2,000.00 by mail on the delinquent taxes and pay the entire delinquent balance within thirty (30) days. (R. 825:¶5) Mr. Frazier did not tell Petitioner at any time that he had to make payment of the $2,000.00 before May 24, 2001, but merely told him that he needed to mail it in. (R. 825:¶5) Unaware of the changed date of the tax sale, Petitioner sent a check for $2,000.00 on May 16, 2001, and arranged for financing to pay off the remainder of the delinquent taxes.

Although Summit County's agreement with Petitioner was (at the least) ambiguous as to when payment had to be made, Petitioner kept his end of the bargain by mailing a check on May 16, 2001. On May 21, 2001, Petitioner (believing the sale date to be May 31, 2001) called the

Auditor's office to confirm receipt of the check, but got a recorded message. Petitioner left a voice mail message and his phone number, but did not receive a return call. Unbeknownst to Petitioner, and in violation of the agreement, Summit County withdrew its promise and sold Petitioner's $2 million property for $31,000 on May 24, 2001.

Petitioner reasonably relied upon Mr. Frazier's promise to postpone the sale. Mr. Frazier reneged on that promise and in so doing violated Petitioner's right to Equal Protection under the Fourteenth Amendment.

The law in this country should describe ascertainable standards for making agreements to postpone tax sales. No such laws or procedures exist in Utah. Such a void provides the opportunity for parties to be discriminated against, treated unequally, or worse, lose their property as occurred here.

III. Customary Safeguards Of American Law Were Violated Here

A. No Review Process

Petitioner's constitutional rights were denied without the customary safeguards of American and Utah law. No second chance – no review process – exists under Utah's tax sale statute. In all other final judgments or decrees, there is a built in opportunity to correct a mistake. A cursory look at these constitutional safeguards makes this point. A judge is allowed a second look at a jury verdict before finality upon motion for judgment notwithstanding the verdict. Pursuant to a Rule 60(b) motion, a default judgment can be set aside within three months upon a showing of mistake or excusable neglect. Judicial sales

provide a six month right of redemption for the property owner. Trials that need more evidence have Rule 59 to allow motions to alter or amend the judgment based on mistake or newly discovered evidence.

Nothing akin to these procedures exists in Utah's tax sale statute. Once a tax deed is issued, the process is over. There should be a review process with a judge within some reasonable redemption period before the unassailable tax deed becomes final.

B. Right Of Trial Was Lost

Significant factual disputes existed in this case. For example: Was the January 23, 2001 delinquent tax billing statement "notice" of a sale or "estimated" notice? What were the terms of the agreement reached between Petitioner and the Summit County Auditor? Did Petitioner justifiably rely on the oral agreement? Did Bobbi Trunnell receive timely notice of the changed tax sale date?

Despite these significant factual disputes, summary judgment was granted. Therefore, Petitioner lost his right to a jury trial and the chance to have his constitutionally mandated "day in court."

CONCLUSION

It is clear from the notice that Petitioner received on January 23, 2001 that Summit County's tax sale was originally set for May 31, 2001. It is also clear from the record that Petitioner never received notice that Summit County had rescheduled the tax sale for May 24, 2001. Moreover, it is clear that the Summit County Auditor led

Petitioner to believe that the May 31, 2001 sale would be postponed. A series of bizarre circumstances then occurred that cost Petitioner his property and means of making a living.

The law loathes the taking of property from a taxpayer without Due Process. Summit County's informal polices and failure to comply with reasonable statutory notice requirements cost Petitioner his property and his means of making a living, and violated his constitutionally protected rights of Equal Protection and Due Process.

Petitioner requests a Writ of Certiorari before this fine Court.

RESPECTFULLY SUBMITTED this 30th day of December, 2004.

B. RAY ZOLL
Counsel of Record
ZOLL & TYCKSEN, L.C.
5300 South 360 West
Suite 360
Murray, UT 84123
Telephone (801) 685-7800
Attorney for Petitioner
Paul Trunnell